Nos. 97-826 (and consolidated cases)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL.,
Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,
Respondents.

AT&T CORP., ET AL.,
Petitioners,

v.

CALIFORNIA, ET AL.,
Respondents.

And Related Petitions

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT COMPETITION POLICY INSTITUTE IN SUPPORT OF PETITIONER

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April 3, 1998

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that the Federal Communications Commission ("FCC") lacked jurisdiction under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (as amended), to promulgate the "interconnection" pricing rules of its *First Report and Order* implementing the landmark Telecommunications Act of 1996.

2. Whether the court of appeals properly found that the FCC's "rebundling" rules for "unbundled network elements" under section 251(c)(3) of the Act, 47 U.S.C § 251(c)(3), are consistent with the plain meaning of the statute.

3. Whether in prescribing rule 51.315(b), 47 C.F.R. § 51.315(b), the FCC appropriately exercised its administrative authority by construing the nondiscrimination requirements of the Act to prohibit incumbent local telephone companies from disassembling already combined network elements before leasing them to competing local carriers.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in Pet. App. at 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, Respondent in Support of Petitioner states as follows:

The Competition Policy Institute ("CPI") is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. CPI is advised by a committee of consumer representatives from around the country and receives its funding primarily from new entrants in the market for local telephone service. CPI has no parent companies, subsidiaries, or affiliates.

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BRIEF FOR RESPONDENT COMPETITION POLICY INSTITUTE IN SUPPORT OF PETITIONER

The Competition Policy Institute ("CPI") submits this brief in support of petitioners FCC, AT&T, MCI and ALTS for review of the judgment of the United States Court of Appeals for the Eighth Circuit in these cases.

OPINIONS BELOW

The principal opinion of the Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* (Pet. App. 1a-

67a),[1] as amended by the court's order on rehearing (Pet. App. 69a-72a), is reported at 120 F.3d 753. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit—First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (excerpts of which are reproduced at Pet. App. 131a-337a)—is reported at 11 FCC Rcd. 15,499 (1996).

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing part, was issued on October 14, 1997. Pet. App. 69a-72a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The most relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a.

STATEMENT OF THE CASE

On February 8, 1996, the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (pertinent provisions codified at 47 U.S.C. §§ 251-76), was signed into law. This landmark legislation, the first comprehensive revision of the Communications Act since its enactment in 1934, was designed by Congress to "open[] *all* telecommunications markets to competition."

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[1] References to "Pet. App." are to the Appendix filed by petitioner AT&T in No. 97-826.

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1, 113 (Jan. 31, 1996) ("Conf. Rep.") (emphasis added). The Federal Communications Commission ("FCC") was directed to implement the critical local telephone competition provisions of the 1996 Act. 47 U.S.C. § 251(d)(1). The petitions before this Court seek review of the Eighth Circuit decisions vacating and upholding certain FCC regulations implementing the 1996 Act. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) ("*First Report and Order*") (excerpts printed at Pet. App. 131a-337a); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,332 (1996) ("*Second Report and Order*") (excerpts printed at Pet. App. 338a-353a).

1. Prior to passage of the 1996 Act, little if any competition had developed in local telecommunications markets. As a result of the antitrust settlement in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), competition developed rapidly in the market for long-distance services. The *AT&T* settlement was founded on the theory that local telephone service was a "natural monopoly." Nearly fifteen years later, local telephone companies (referred to as "local exchange carriers") continue to retain monopolistic control over the provision of local telecommunications services. Consequently, telephone customers virtually never have a choice of providers for local phone service, preventing consumers from obtaining the many benefits attending competitive markets. These local monopolies are largely regulated by state public utility commissions and the FCC. Earlier this decade, some states sought to bring the benefits of competition to their local telecommunications markets, but these efforts were hindered

by the opposition of incumbent local exchange carriers and the lack of a national policy framework. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182, 11 FCC Rcd. 14,171, ¶ 5 (April 19, 1996).

2. With the 1996 Act, Congress established a "national policy framework" designed to bring the benefits of competition to local telephone consumers throughout the country. Conf. Rep. at 1, 13. Congress amended Title II of the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., to establish baseline federal policies to allow local competition to develop nationwide. In order to ensure consistency and uniformity in implementation of this national policy framework, the FCC was charged with ensuring that the Act's requirements were met. At the same time, in order to reflect the particularities of service at the local level, state commissions were also given a substantial role under the Act. This balanced regulatory approach ensures the development of a uniform national policy that rationally accounts for differing conditions at the local level.

There are three different means of competitive entry into local telecommunications services permitted under the 1996 Act. 47 U.S.C. § 251. Each mode of entry will attract a different kind of competitor, thus maximizing the likelihood of producing competitive local markets "as quickly as possible." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 89 (July 24, 1995) ("H. Rep."). First, competing local carriers can "interconnect" their own networks with the facilities of the existing, incumbent local carriers. Interconnection is especially important to facilities-based competitors, who are unlikely in the short run to have constructed local telephone networks connecting every single customer. Second, because local telecommunications

competition will not develop if new entrants are required to build their own facilities before initiating service, the Act entitles competitors to enter the local market by leasing pieces of the existing local exchange networks, referred to as "unbundled network elements" (switches, local telephone "loops," directory assistance, etc.), from incumbent carriers. Third, consistent with the FCC's traditional rules governing telecommunications services, other carriers are authorized to "resell" services of the incumbent local exchange carrier, thus allowing new competitors to offer a complete array of services immediately upon entry into the local telephone marketplace.

The principal provisions of the Act promoting local telephone competition are sections 251 and 252. Section 251 establishes specific obligations of incumbent local exchange carriers with respect to each mode of local telephone entry: interconnection, unbundled network elements and resale. Interconnection and "access to network elements on an unbundled basis" must both be offered to all competing telecommunications carriers on rates, terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. §§ 251(c)(2)(D), (c)(3). Incumbents are "required to offer for resale at wholesale rates any telecommunications service" sold to end user customers. *Id.* § 251(c)(4)(A). To enforce these obligations, the FCC is required to "establish regulations" implementing "the requirements of this section." *Id.* § 251(d)(1). And to facilitate the rapid movement of local markets towards competitive entry, Congress directed the FCC to "complete all actions necessary" to promulgate these implementing regulations "within 6 months." *Id.*

Section 252 sets forth the procedures that competitors and individual incumbent carriers must follow in order to meet the core requirements of section 251. 47 U.S.C. § 252.

Carriers must first negotiate an "interconnection agreement," and where negotiations fail to result in an expeditious agreement, state commissions are directed to arbitrate interconnection disputes. State commission resolution of issues presented for arbitration by the carriers must meet the requirements of section 251 and the FCC's implementing regulations. 47 U.S.C. § 252(c)(1). State commissions are charged with responsibility to "determine," consistent with the requirements of section 251, rates for interconnection, unbundled elements and resale. 47 U.S.C. §§ 252(d)(1), (d)(3). Section 252(d) provides that these rates are to be based on the "cost" of the service. In the event that a state commission does not fulfill its statutory role, the FCC is directed to assume these responsibilities. 47 U.S.C. § 252(e)(5). Once interconnection agreements are approved, they are subject to review by the federal courts, but not state courts, to determine if the requirements of sections 251 and 252 have been met. 47 U.S.C. §§ 252(e)(4), (e)(6).

Finally, in section 271 of the Act, Congress provided the former Bell Companies, called Regional Bell Operating Companies, with an incentive for opening their local markets. Once a regional company demonstrates that it has successfully complied with the requirements of section 271, the FCC is directed to permit the incumbent to provide long-distance services if it concludes (with the advice of the Department of Justice) that such long-distance entry is in the "public interest." 47 U.S.C. § 271. The FCC is directed to review such petitions to determine if they satisfy a specified fourteen-point checklist that references, *inter alia*, the requirements of sections 251 and 252. 47 U.S.C. § 271(c)(2)(B). In addition, the FCC must fill in where state commissions fail to carry out their statutory role and must ensure that the requirements of sections 251 and 252 are met

prior to approval of a Regional Bell Operating Company's petition to provide long-distance services.

Thus, Congress distributed jurisdictional responsibility for ensuring the development of local competition between both state and federal regulatory agencies. The FCC must implement section 251's requirements, the states must review, arbitrate and approve interconnection agreements, and the federal courts are charged with judicial review of those state-approved agreements.

3. On August 8, 1996, the FCC met the six-month statutory deadline to implement the requirements of section 251 and issued its *First Report and Order*. This order provided substantial detail and guidelines for implementation of the Act's requirements. Among the regulations enacted by the FCC was the establishment of pricing guidelines for setting rates for interconnection, unbundled network elements and resale. The FCC's rules defined the basic costing and pricing methodology to be used for determining whether rates for interconnection and unbundling were "just, reasonable, and nondiscriminatory" as required by sections 251(c)(2) and 251(c)(3). Likewise, the Commission established a methodology for determining resale rates under section 251(c)(4).

The FCC also defined the "network elements" that incumbent carriers are required to unbundle pursuant to section 251(c)(3). In establishing unbundling rules, the FCC implemented regulations to ensure that incumbent carriers allow competitors to combine, or "rebundle," network elements. Specifically, the FCC held that incumbent carriers must allow competitors to combine leased elements to provide finished telecommunications services. These regulations also prohibit discriminatory behavior by the incumbent in providing access to its network as required by section

251(c)(3). The FCC ruled that in order to prevent discrimination and anticompetitive conduct by incumbent carriers, incumbents may not break apart already combined network elements before leasing them to competing local carriers. 47 C.F.R. § 51.315(b). This ensures that incumbents cannot retard competitive local entry by imposing on their competitors the cost and delay of integrating network elements that are already combined in the incumbent's own telecommunications network.

4. Petitions for judicial review of the FCC's *First Report and Order* were filed by incumbent carriers in several federal courts and consolidated and assigned by lottery to the United States Court of Appeals for the Eighth Circuit. *See* 28 U.S.C. § 2112(a)(3). These petitions challenged a number of rules, including the FCC's pricing rules and the agency's requirements with respect to rebundling and disassembly of unbundled network elements.

On July 18, 1997, the Eighth Circuit issued its decision. Without reaching the merits of the FCC's pricing rules, the court of appeals found that these rules exceeded the agency's jurisdiction on the ground that section 252 gives state commissions exclusive authority to set prices for interconnection, unbundled elements and resale. Pet. App. 11a-12a. On rehearing, the Eighth Circuit invalidated the FCC's rule 51.315(b), which it had initially left intact, holding that the Act entitles an incumbent carrier to disconnect previously combined elements. *Id.*

5. Following the Eighth Circuit's decisions, petitions for certiorari were filed by numerous parties seeking review of the judgment. Cross Petitions were filed by several opposing carriers requesting review of certain other aspects of the Eighth Circuit's ruling. This Court accepted certiorari

and consolidated all the petitions and cross petitions seeking review of the court of appeals' judgment.

SUMMARY OF THE ARGUMENT

In enacting the Telecommunications Act of 1996, Congress affirmatively sought to alter the *status quo* by establishing a "national policy framework" to accelerate the development of local telephone competition. The new regulatory scheme fashioned by Congress expressly recognizes the unique character of interconnection, unbundling and resale, and thus eschews reliance on the interstate/intrastate jurisdictional allocation traditionally used for regulation of telecommunications services.

Because the local telephone network encompasses both intrastate and interstate components that are not within the exclusive jurisdiction *either* of the FCC or state public utility commissions, the 1996 Act contemplates shared federal/state responsibility for implementing measures to open local telephone markets to competition. Thus, section 251 directs the FCC to "establish regulations" implementing the requirements for interconnection, including pricing. Section 252, on the other hand, directs state commissions to arbitrate interconnection agreements and to "determine" the prices for interconnection, unbundled network elements and resale based on the "cost" of the service. This shared responsibility over pricing is fully consistent with Congress's desire for a nationwide policy to promote competition at the local level "as quickly as possible."

The best way the local telecommunications competition envisioned by Congress can occur on a national basis is with a single definition of "cost" that is implemented uniformly for individual states and local exchange carriers nationwide. The states continue to have a substantial role in

furthering and maintaining the national policy of local competition, circumscribed by the Act's requirements and the FCC's implementing regulations.

The Eighth Circuit's decision to grant complete pricing authority to the states is based on several errors: (1) it ignores the explicit language and structure of the Act giving the FCC authority over rates; (2) it incorrectly assumes that interconnection, unbundled network elements and resale are solely "intrastate" services; (3) it improperly substitutes the Eighth Circuit's interpretation of the 1996 Act for that of the FCC, thereby ignoring this Court's rulings on deference to administrative agencies; and (4) it incorrectly applies section 2(b) of the Communications Act, 47 U.S.C. § 152(b)(1), in a manner that conflicts with the authority affirmatively granted the FCC under section 251. Because section 251 authorizes the FCC to "establish regulations" for interconnection, unbundled network elements and resale—including definitions of "just and reasonable" rates under sections 251(c)(2)-(3) and wholesale rates under section 251(c)(4)—neither section 252 nor section 2(b) is a jurisdictional barrier to promulgation by the FCC of rules defining interconnection "cost" for purposes of state "determination" of interconnection rates in arbitrations.

The Eighth Circuit properly concluded that the definitions of unbundled network elements, and the FCC's rule allowing competitors to "rebundle" network elements, fall within the Commission's statutory jurisdiction in light of the clear statutory jurisdiction for the agency to promulgate unbundling rules. However, the court of appeals erred in overturning on rehearing the provisions of the *First Report and Order* prohibiting incumbents from disassembling already combined unbundled network elements. The FCC's rule is a reasonable interpretation of the statutory language that is entitled to deference by the appellate court.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE 1996 ACT'S MODEL OF SHARED JURISDICTIONAL AUTHORITY BETWEEN THE FCC AND STATES FOR INTERCONNECTION PRICING

The 1996 Act creates a model of regulatory jurisdiction that is specially fashioned to meet the congressional goal of a rapid transition to competitive local telecommunications under a national policy framework. Section 251 requires the FCC to "establish regulations" to "implement[ ]" the provisions governing interconnection, unbundling and resale, including the requirement that rates be "just, reasonable, and nondiscriminatory." 47 U.S.C. §§ 251(c)(2), (c)(3), (d)(1). Section 252 provides that state commissions are to "determin[e]" interconnection prices, based on the "cost" of the respective service, in resolving interconnection arbitrations. 47 U.S.C. §§ 252(d)(1), (d)(3). Congress clearly intended that both the FCC and the states would have authority over pricing issues. By allowing section 252 to supersede section 251, the Eighth Circuit rendered meaningless the affirmative "rates" provisions of the latter. The court of appeals' judgment therefore accords exclusive authority over pricing to the states in a manner that cannot be squared either with the language and structure of the Act or with the congressional objective of establishing a national policy framework to promote local telephone competition.

A. Congress Established a Unique Regulatory Structure and a National Policy Framework to Open Local Telephone Markets to Competition

In overturning key facets of the FCC's *First Report and Order*, the Eighth Circuit did not reach the substantive

merits of the FCC's pricing rules, but rather based its decision on the erroneous conclusion that the FCC lacked jurisdiction to promulgate any pricing rules. Specifically, the court held that the traditional interstate/intrastate jurisdictional allocation originally enacted in 1934, *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), also applies to sections 251 and 252 of the 1996 Act. Pet. App. 22a-23a. Consequently, the Eighth Circuit failed to recognize that the language, structure and purpose of the 1996 Act create new shared federal/state regulatory responsibilities for opening local telephone markets to competition.

This dual regulatory approach is readily apparent when the statutory provisions of the Act are read as a whole. Yet, rather than discern the congressional scheme, the Eighth Circuit simply parsed certain statutory sections in isolation. The resulting decision is not only contrary to settled principles of statutory interpretation and judicial deference, but undermines the overall scheme and function of the Act.

There is no question that Congress intended to establish a new "pro-competitive, de-regulatory *national* policy framework" for the communications industry. Conf. Rep. at 1, 113 (emphasis added). Nor is there any disagreement that the central goal of the Act was to create "competition as quickly as possible." H. Rep. at 89. Thus, the Act's "major components * * * were designed to promote competition in the local telephone service market." *Reno v. ACLU,* 117 S. Ct. 2329, 2337-38 (1997). In an effort to jump start competition, Congress directed federal and state regulators to work together to implement the provisions governing access by competitors to the local telephone network. In other words, the "national policy framework" of the Act contemplates shared federal and state responsibility

for introducing competition through interconnection, unbundling and resale.

As discussed more fully in Section I.B, Congress's intent to create a shared system of federal and state responsibility for opening local markets to competition is evident when the local competition provisions of the Act are viewed as a whole.

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature. *Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974).

The Eighth Circuit violated this well-settled principle of statutory construction by viewing the language of section 252(d) (states "determine" interconnection rates) in isolation from the balance of the 1996 Act.

As directed by the Act, the FCC "establishes regulations" necessary to implement local competition under section 251. 47 U.S.C. § 251(d)(1). Section 251 includes provisions requiring that rates be "just, reasonable, and nondiscriminatory" 47 U.S.C. §§ 251(c)(2), (c)(3). The FCC then hands off responsibility to the states, pursuant to section 252, to examine and "determin[e]" the specific rates, terms and conditions actually incorporated in individual interconnection agreements. 47 U.S.C. § 252(d). State commissions thus implement both rate and non-rate provisions of Act, in accordance with section 251 and the FCC's regulations, in the context of carrier-specific interconnection

arbitrations. Requiring compliance with FCC rules is essential to maintain a national policy framework. This dual regulatory approach allows the FCC to establish uniform national rules that ensure compliance with section 251's requirements, while permitting states to set specific prices that take into account the particular "costs" of each local area and incumbent local carrier and to approve the actual interconnection agreements.

Consequently, the Eighth Circuit's insistence on maintaining traditional intrastate/interstate jurisdictional roles thwarts the congressional goal of opening local markets to competition in a nationally consistent fashion. Granting exclusive interconnection pricing authority to the states on grounds that unbundling and interconnection are "fundamentally intrastate," Pet. App. 22a-23a, as the Eighth Circuit reasoned, in fact strips the FCC of any ability to ensure consistent, uniform application of section 251's requirements in the hundreds of interconnection agreement arbitrations supervised by state commissions. Under the Eighth Circuit's decision, the "national policy framework" and uniformity sought by Congress can only be achieved through Supreme Court review of federal section 252(e)(6) actions challenging state arbitration proceedings.[2] This highly unusual approach to statutory interpretation—in essence delegating to state regulatory commissions the ability to interpret a federal statute—cannot be assumed in the absence of some affirmative manifestation by Congress. The law is clear that state commissions are due no deference when interpreting a

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[2] *See* 47 U.S.C. § 252(e)(6)("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

federal statute. *E.g., Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495-96 (9th Cir. 1996).

B. The Local Competition Provisions of the Act Contemplate Shared Federal/State Authority

1. Sections 251 and 252 Create a "New Model" of Jurisdictional Authority for Interconnection

Sections 251 and 252, read together, clearly establish that Congress sought to eschew the traditional intrastate/interstate jurisdictional regulatory scheme in favor of a new, shared jurisdictional model that would more rapidly permit the development of local competition on a consistent national basis. Indeed, the first line of the legislative history of section 251 makes explicit reference to a "new model" of interconnection. Conf. Rep. at 121. Consequently, and deliberately, neither section 251 nor section 252 ever refers to unbundling, interconnection or resale as either "intrastate" or "interstate," the traditional line of jurisdictional demarcation under the original 1934 Act. *See Smith v. Illinois,* 282 U.S. 133 (1930); 47 U.S.C. § 152(b)(1).

Congress chose this "new model" because the unique character of interconnection, unbundled network elements and resale defies reliance on traditional interstate/intrastate jurisdictional allocation. The same copper telephone "loops," whether made available via interconnection, unbundling or resale, will be used by competing carriers to provide both intrastate and interstate telecommunications services. Nothing in the Act limits their use; nothing requires carriers to purchase some unbundled network elements for interstate services and another set of unbundled elements for intrastate services. Instead of dividing telephone facilities and regulation along intrastate and

interstate lines, as under the 1934 Act (which limited the FCC to regulating "interstate" communications), sections 251 and 252 establish joint jurisdiction over unbundling, interconnection and resale because those services and facilities will be used on an intrastate and interstate basis.

The omission of any reference to "intrastate" or "interstate" interconnection services is significant. Under sections 251 and 252, both state and federal regulators undertake responsibilities that they could not have performed under the traditional 1934 Act regime. Thus, for example, the FCC establishes rules to implement unbundling, interconnection and resale for incumbent local exchange carriers, regardless of whether these services or facilities are used for intrastate or interstate purposes. 47 U.S.C. § 251(d). Likewise, states must approve interconnection agreements that apply to provision of services for *both* intrastate and interstate communications, 47 U.S.C. § 252(e), and must "determine" prices for both intrastate and interstate use of interconnection, unbundled network elements, and resale.

The Eighth Circuit held that state commissions enjoy exclusive jurisdiction over prices for unbundled network elements, interconnection and resale. In the court of appeals' view, the FCC lacks jurisdiction to set pricing because it assumed that interconnection is "fundamentally intrastate." Pet. App. 22a. Yet the court failed to examine the *consequences* of its assumption, namely that pricing under the Act, if left solely to state commissions, gives state commissions jurisdiction over *interstate* communications services. There is no authority anywhere in the Act or its legislative history for the proposition that states can regulate interstate services. Indeed, the Communications Act elsewhere grants the FCC exclusive jurisdiction to regulate interstate telecommunications services. And where interstate and intrastate services are inextricably mixed, as here, the courts

have long permitted FCC *preemption* of state regulatory authority. *See North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977)("*NCUC II*"); *accord Illinois Bell Tel. Co. v FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 215-16 (D.C. Cir. 1982); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1114-15 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). *See, e.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

Congress's omission of any "intrastate" or "interstate" language in sections 251 and 252 was deliberate. Other provisions of the Act demonstrate that where Congress wanted to maintain the interstate and intrastate jurisdictional scheme, it did so. For instance, in the Act's provisions concerning pay-per-call services, *see* 47 U.S.C. § 228, and payphone compensation, *see* 47 U.S.C. § 276, Congress explicitly stated that the provisions would apply to all "interstate and intrastate" calls. Likewise in section 254, Congress explicitly maintained the intrastate/interstate distinction for universal service, and fashioned new regulatory rules for determinations concerning those jurisdictional parameters. *See* 47 U.S.C. § 254(f).

These differences demonstrate unequivocally that Congress could and did maintain the distinction between interstate and intrastate services where it intended such distinctions to be preserved. Congress's failure to use such traditional language in the 1996 Act's central provisions on interconnection confirms Congress's expressed intent to fashion a "new model" of shared regulatory jurisdiction. *See* Conf. Rep. at 121. The court of appeals' failure to consider the language and structure of sections 251 and 252, in context, is thus the fatal flaw in its holding that section

252(d) accords exclusive interconnection pricing to state commissions.

2. The Eighth Circuit Improperly Read Section 252's Pricing Language in Isolation from the Rest of the Statute

The court of appeals erred in failing to construe section 252's pricing language in harmony with the rest of the statute. *See Kokoszka*, 417 U.S. at 650. Looking solely at section 252, the Eighth Circuit reasoned that

> subsection 252(d) refers exclusively to the determinations by state commissions of the just and reasonable rates, and it provides statutory standards for the state commissions to follow when setting the rates, *thus negating any need for additional FCC standards or guidelines.* Pet. App. 14a (emphasis added).

Accordingly, the court held that the FCC's pricing rules supplant state commissions' ability to "establish" or "determine" rates as directed in section 252(d). Pet. App. 21a n.19. This logic is incorrect.

The Eighth Circuit's conclusion "that the Act *plainly* grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act," Pet. App. 14a (emphasis added), is wrong. The court of appeals' opinion fails to address the critical issue of whether the FCC's rules prevent the state commissions from "determining" or "establishing" rates under section 252(d). The fact that "the Act directly and straightforwardly assigns to the states the authority to set prices regarding the local competition provisions of the Act in subsection 252(c)(2) and 252(d),"

Pet. App. 17a, in no way precludes the FCC from establishing a uniform federal pricing *methodology*.

The methodology set out in the FCC's *First Report and Order* effectively implements the requirements of section 251 that access to interconnection and unbundled network elements be provided "on *rates*, terms and conditions that are just reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement *and the requirements of this section and section 252*," 47 U.S.C. §§ 251(c)(2)(D), (c)(3) (emphasis added). By defining "based on cost," the FCC's rules that ensure that states make rate determinations based on a single, uniform costing methodology. *See, e.g., First Report and Order* ¶¶ 618, 625. This methodology does *not* "determine" or "establish" the actual rates, *id.* ¶ 618, but rather leaves the rate-making function to states, which are best positioned to make such fact- and record-dependent determinations.

Interpreting the 1996 Act to support this sort of bifurcated pricing jurisdiction is consistent with the common usage of the language employed by Congress. Under section 251, the FCC is required to "implement" the provisions of the Act. In contrast, under section 252, state commissions must "establish" or "determine" rates for interconnection and unbundled network elements. *First Report and Order* ¶ 618. The Eighth Circuit's reading of the statute equates "determine" with "implement," implying that Congress wanted states to define the pricing standards, as well as set actual interconnection prices, under section 252. Yet this approach turns the common meaning of the statutory language on its head.[3]

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[3] This Court has repeatedly looked to dictionary definitions where statutory ambiguities require it to discern Congress's intent. *See,*

Dictionaries define these terms very differently. *Implement* is defined as "[t]o carry into effect; fulfill; accomplish . . . [t]o provide what is needed for; supplement." FUNK & WAGNALLS STANDARD DICTIONARY 635 (1978). *Determine* is defined as "to fix conclusively or authoritatively" or "to settle or decide by choice of alternatives or possibilities" or "to fix the form, position or character of beforehand" or "to bring about as a result" or "to find out or come to a decision about by investigation, reasoning, or calculation." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 346 (1984); *accord,* FUNK & WAGNALLS STANDARD DICTIONARY 349 (1978)("to settle or decide, as an argument, question or debate. . . . to ascertain or fix, as after thought or observation. . . . to cause to reach a decision. . . . to regulate; fix or decide causally."). *Establish* is defined as "to settle or fix firmly; make stable or permanent." *Id.* at 434. Thus, the terms "determine" and "establish" both connote the setting or fixing of particular rates, or selecting actual values.[4] By authorizing the FCC to "implement" the Act's pricing provisions, Congress must therefore have intended that the agency "supplement" the bare-bones language of the

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e.g., United States v. LaBonte, 117 S. Ct. 1673 (1997)(Thomas, J.) (defining "maximum" sentencing guidelines); *Allied-Bruce Terminix Companies v. Dobson,* 513 U.S. 265 (1995)(Breyer, J.)(defining what "involves" and "affects" commerce); *Hubbard v. U.S.,* 514 U.S. 695 (1995)(Stevens, J.)(defining what "shows" congressional intent); *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179 (1995)(Scalia, J.)(definition of "marketing").

[4] Because it permits states to decide what the statutory "cost" standard for interconnection prices means in the context of arbitration proceedings, the Eighth Circuit's interpretation essentially equates "determine" with "define." However, *define* is a much broader term, meaning "to determine or identify the essential qualities or meaning of" or "to discover or set forth the meaning of" or "to make distinct, clear or detailed in outline." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 334 (1984); *accord* FUNK & WAGNALLS STANDARD DICTIONARY 336 (1978 ("to state the meaning of (a word or phase)").

Act's interconnection pricing standards by "providing what is needed" for states to "determine" prices, namely defining the "cost" standard of section 252(d).

This bifurcated approach to pricing also reflects Congress's desire to promote some degree of national uniformity. The statutory "standards" referred to by the Eighth Circuit are not self-executing; without regulations interpreting and defining the statutory language, the pricing standards alone are imprecise. The term "based on cost" in section 252(d)—the pricing standard for interconnection and unbundled network elements—is subject to widely disparate, and inconsistent, interpretations. In telecommunications regulation, "cost" has historically assumed many meanings, including basic methodological differences such as whether incumbent local exchange carriers should recover historical, embedded costs or forward-looking costs, and under what methodology such costs should be measured.[5] Therefore, contrary to the court of appeals' reasoning, the language of section 252(d) does not "negate" the need for FCC rules, but instead shows that without guidelines on such fundamental methodological concerns, there can be no hope of a nationally uniform framework for local telephone competition.

3. The Structure of the 1996 Act Confirms Congress's New Model of Shared Federal/State Jurisdiction

The structure of sections 251 and 252 reveals a strong and significant interrelationship. Throughout section 251,

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[5] James C. Bonbright et al., PRINCIPLES OF PUBLIC UTILITY RATES 109 (1988)("'Cost' like 'value' is a word of many meanings, with the result that people who disagree, not just on minor details but on major principles of ratemaking policy, all may subscribe to some version of the principle of service at cost.")

there are cross-references to section 252, *see, e.g.*, 47 U.S.C. §§ 251(c)(1), (c)(2)(D), (c)(3), and section 252 likewise cross-references the requirements in section 251. *See, e.g.*, 47 U.S.C. §§ 252(a)(1), (c)(1), (d)(1)-(3), (e)(2)(B), (f). For instance, unbundled network elements must be priced at "just, reasonable, and nondiscriminatory rates" that are "in accordance with . . . the requirements of section 252." 47 U.S.C. § 251(c)(3). It is clear from these cross-references that Congress intended both federal and state commissions to have a role under the local competition provisions of the Act.

Consequently, even though the mandate for states to "determine" interconnection prices in section 252(d) does not require such prices to be set "in accordance with" section 251, Pet. App. 13a-14a, it does provide that states are to "determin[e]" prices "for purposes of" section 251's "just, reasonable, and nondiscriminatory" rates requirement. 47 U.S.C. § 252(d).[6] Furthermore, section 252(c)(1) requires that states "ensure" that their interconnection arbitration decisions "meet the requirements of section 251, including the regulations prescribed by the Commission." 47 U.S.C. §

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[6] The Eighth Circuit found it significant that section 252(d) does not contain any reference to the FCC's section 251 rules. Pet App. 13a. Yet section 252(d) itself is constrained by section 252(c), which *does* contain explicit references to both section 251 and the FCC's rules. A state does not always determine the prices; if the parties to a negotiation agree on prices, the state reviews the agreement under section 252(e)(2)(A). 47 U.S.C. § 252(e)(2)(A). States only step forward to "determine" prices if the parties cannot agree and ask the state to arbitrate. Section 252(c) states that "in resolving by arbitration . . . *any* open issues . . . a State commission shall (1) ensure that such resolution and conditions meet the requirement of section 251, including the regulations prescribed by the Commission." 47 U.S.C. § 252(c)(emphasis added). "[A]ny open issues" includes pricing issues. *See* section 252(c)(2). Thus, the cross-reference in section 252(c) to the FCC's rules also applies to state determinations of "cost" under section 252(d), and state cost decisions must, accordingly, be consistent with the FCC's section 251 rules.

252(c)(1). In light of these express interrelationships between sections 251 and 252, the Court cannot infer that Congress intended to create a pricing-specific exception to the requirement that state implementation of decisions must comply with the requirements of section 251 and the FCC's rules. While Congress could have been more expansive in delineating the federal and state regulatory roles, the evident interrelationship between the two sections establishes Congress's intent that *both* federal and state agencies participate in pricing decisions, regardless of "interstate" or "intrastate" use of interconnection, unbundling, and resale.

Interpreting the statutory language of sections 251 and 252 to establish shared jurisdiction over opening local telephone markets to competition is consistent with the Congressional purpose of establishing a national communications policy framework for local competition. *See infra,* Section I.B. Competitors need to know what the rules are before rolling out service; states have experience holding hearings and conducting cost studies for telecommunications services. Thus, by permitting the FCC to set generic pricing requirements for "just and reasonable rates," while authorizing states to "determine" prices in specific arbitration proceedings, Congress efficiently allocated work to the agency best equipped to implement the 1996 Act most expeditiously.

II. THE EIGHTH CIRCUIT WAS REQUIRED TO DEFER TO THE FCC'S INTERPRETATION OF PRICING JURISDICTION UNDER THE 1996 ACT

A. The Eighth Circuit Erred in Concluding That the 1996 Act "Plainly" Leaves All Pricing Jurisdiction to the States

The 1996 Act does not expressly state precisely how jurisdiction over its pricing provisions for interconnection and unbundled elements will be allocated. The Eighth Circuit acknowledged that it must defer to agency interpretations "if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes," Pet. App. 8a (citing *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)), but incorrectly concluded that the grant of section 251 rulemaking authority "plainly" did not extend to pricing methodologies for interconnection. Pet App. 14a. The Eighth Circuit likewise improperly found that section 251's rulemaking provisions are solely time constraints, not substantive grants of regulatory authority. Pet. App. 10a. Based on this erroneous substitution of its own statutory interpretation for that of the agency, the Eighth Circuit concluded that "the FCC exceeded its jurisdiction in promulgating the price rules regarding local telephone service." Pet. App. 9a-10a.

1. The Act's Language is Ambiguous with Regard to Jurisdiction Over Pricing

While the 1996 Act clearly sets forth that both the FCC and state commissions have a role over pricing, the Act does not plainly provide how this joint responsibility shall be implemented. Section 251 indicates an FCC role, requiring the FCC to "complete all actions necessary to establish

regulations to implement the requirements" of section 251, including the "just and reasonable rates" requirements in sections 251(c)(2) and (c)(3). 47 U.S.C. § 251(d)(1). Section 252 indicates a state role, directing states to "establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c). But neither section provides that either the FCC or the states have *exclusive* jurisdiction for setting interconnection prices. Thus, in the absence of express language, the Court must examine the language, structure and purpose of Act to discern congressional intent, *Kokoszka,* 417 U.S. at 650, and should defer to the agency's interpretations if they are a "reasonable construction" of the statute. *Chevron,* 467 U.S. at 842-45.

2. The FCC Reasonably Interpreted the Ambiguous Statute

It is a "dominant, well-settled principle of federal law" for courts to grant "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers." *National RR Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992); *see Chevron,* 467 U.S. at 842-43. The FCC's promulgation of interconnection pricing rules is a fair reading of ambiguous statutory language. Pursuant to section 251(d)(1), the FCC was directed by Congress to "establish regulations to implement the requirements" of section 251. 47 U.S.C. § 251(d)(1). Congress did not limit the FCC's implementation authority only to particular enumerated subsections, as it could and would have if it intended the result adopted by the Eighth Circuit.

Accordingly, the grant of FCC rulemaking authority requires the FCC to promulgate regulations implementing *all* of section 251's requirements. These regulations necessarily include rules for setting "just and reasonable" rates for interconnection, unbundled network elements and resale that,

in light of the additional "cost" standard of section 252(2), meet the requirements of *both* sections 251 and 252. Indeed, section 251(c)(2)(D) states that interconnection prices must be "just, reasonable, and nondiscriminatory in accordance with . . . *the requirements of this section and section 252.*" 47 U.S.C. § 251(c)(2)(D)(emphasis added); 47 U.S.C. § 251(c)(3)(same). It would therefore have been foolhardy, and perhaps unlawful, for the FCC to define a methodology for "just and reasonable" interconnection rates without acting in harmony with the "based on cost" standard of section 252.

Section 251(d)(1), like a "necessary and proper" clause, is an affirmative grant of authority to develop rules for all of section 251, including "rates, terms, and conditions." *See* 47 U.S.C. §§ 251(c)(2), (c)(3). Contrary to the court of appeals' reasoning, the fact that the Act does not specifically state that the Commission is authorized to promulgate pricing rules, *see* Pet. App. 11a, is irrelevant; section 251 gives express authority to the FCC to promulgate *all rules* necessary to "implement" its terms consistent with section 252. This is precisely what the FCC did in setting pricing guidelines in the *First Report and Order*.

The FCC's interpretation is reasonable because Congress could not have intended that the agency be allowed to define "just and reasonable" interconnection rates in a way that conflicts with the section 252 standard that states must apply in arbitrations. Indeed, the FCC's guidelines ensure that the Act is implemented such that congressional intention, policy and objectives are fulfilled. *See Kokoszka*, 417 U.S. at 650. Had the FCC failed to refer to section 252 that could, and likely would, have led to inconsistent results. *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977)(federal policy must supersede individual state policies where inconsistent state policies are likely to result.) The FCC's pricing guidelines are the only way to ensure this congressional

intent is realized. Thus, the Eighth Circuit's conclusion that "nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access, and resale, and the transport and termination of telecommunications traffic," Pet. App. 12a, fails to comport not only with Congress's directives to the agency in section 251, but also with the clear and uncontested congressional intent to create a uniform national policy framework for opening local markets to competition.

3. The Eighth Circuit Erred in Concluding that Section 251 Creates Only a Timing Constraint

The Eighth Circuit's jurisdictional analysis rests on a faulty reading of a key portion of section 251. The court of appeals concluded "that subsection 251(d)(1) operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement." Pet. App. 12a.

This conclusion is wrong for two reasons. First, section 251(d)(1) requires the FCC "within 6 months after the enactment of the [1996 Act]," to "complete all actions necessary to establish regulations to implement the requirements" of section 251, including the pricing requirements of section 251(c). 47 U.S.C. § 252(d)(1). Nothing in this language limits the provision to the procedural issue of timing alone. By its terms, section 251(d)(1) is both a six-month deadline *and* a substantive grant of authority to implement the provisions of section 251.

Second, even if section 251(d)(1) can be read as "primarily" a procedural clause, it is sufficiently ambiguous

that the Eighth Circuit should have deferred to the agency's conclusion that section 251(d)(1) is an affirmative grant of rulemaking authority.[7] *Chevron*, 467 U.S. at 843-45. The court of appeals did not (and could not) conclude that the rulemaking provision is only a timing constraint, because without the directive in section 251(d)(1), there would have been no agency obligation to promulgate regulations for the Act's non-price provisions (many of which the Eighth Circuit upheld). Furthermore, the six-month limitation can just as easily be seen as an implementation of the congressional goal to introduce local telephone competition "as quickly as possible," by requiring the FCC to rapidly fashion a "national policy framework" fleshing out the statutory language, as an implicit constraint on federal jurisdiction. Finally, in section 251, Congress *did* "expressly call[] for the Commission's involvement" in interconnection pricing. The Eighth Circuit's flawed "plain meaning" analysis begs the real question of the scope and extent of that involvement.

B. Congress Did Not Alter the Agency's General Authority To Implement Its Enabling Statute

The FCC always has enjoyed general rulemaking authority to issue rules implementing the Communications Act of 1934. Under section 201(b) of the Communications Act, the FCC has authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); *see*

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[7] *Chevron* deference extends to agency interpretations of jurisdictional provisions. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115-16 (1988) (upholding EEOC interpretation of the jurisdictional provisions in § 706 of the Civil Rights Act of 1964 under *Chevron* standard of review).

also 47 U.S.C. §§ 154(I), 303(r); *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943). This authority extends to *all* of "the provisions of" the Act. 47 U.S.C. § 201(b). Thus, the Eighth Circuit's decision marks the first time that a court has held that, despite section 201(b), the FCC lacks authority to implement key substantive provisions of the federal telecommunications law.

Rather than create a wholly separate statute when it created the local competition provisions of the 1996 Act, Congress chose to amend Title II of the Communications Act. Congress could have, but did not, limit the Commission's authority under section 201(b) to implement the provisions of the Act. Thus, the provisions of the 1996 Act, as part of Title II, fall squarely within the Commission's section 201(b) rulemaking authority, giving the FCC independent authority to implement the provisions of sections 251 and 252 the Act.

Furthermore, the Eighth Circuit's interpretation would lead to administrative inefficiency. Under the court of appeals' view, the FCC cannot adopt rules to enforce a provision of the Communications Act unless the provision specifically authorizes the agency to engage in rulemaking. A section of the Communications Act with no reference to FCC rules would be enforceable only by the courts. This result, which essentially bypasses the FCC, ignores the basic function of administrative agencies under our constitutional system of separation of powers. The untoward consequence of the Eighth Circuit's reasoning is thus to throw into question hundreds of agency enabling statutes where Congress has granted general, but not section-specific, rulemaking powers, and to encourage Congress to "micro-manage" legislation that is best left to administrative agencies to interpret and apply in light of rapidly changing

real-world considerations the legislature cannot be expected to know or predict.

C. The Court of Appeals Incorrectly Applied the "Fence" of Section 2(b) to Overturn Congress's Intent

1. The Eighth Circuit Erred in Concluding That the Services at Issue Were "Intrastate" Under Section 2(b)

Section 2(b) of the Communications Act provides that "nothing in this [Act] shall be construed to apply or give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). The Eighth Circuit concluded that this provision "is hog tight, horse high and bull strong," and bars the FCC from "intruding on the states' intrastate turf." Pet. App. 23a. This conclusion is erroneous.

Section 2(b)'s limitation of FCC action applies only to "intrastate" services. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 335, 373 (1986). Ignoring the considerable federal caselaw on this point, the Eighth Circuit assumed, without record or legislative history support, that interconnection and unbundled elements are intrastate services and facilities subject to section 2(b). Pet. App. 15a. This assertion is untrue, since "[t]he same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well." *NARUC v. FCC*, 737 F.2d at 1113.[8] The court of appeals'

[8] *Accord Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *Public Utils. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d

judgment must fail because its entire analysis is based on the faulty premise that interconnection is a traditional "local" telephone service subject to state public utility commission jurisdiction under *Smith v. Illinois*, 282 U.S. 133, 148 (1930).

The Eighth Circuit simply *assumes*, with pure *ipse dixit* reasoning, that because of the word "local" (as in "local exchange carriers"), the FCC's pricing rules must apply only to intrastate services.

> [T]he prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale—the service and facilities that will enable competitors to provide competing *local* telecommunications services—as well as the rates for the transport and termination of telecommunication traffic qualify as "charges . . . for or in connection with intrastate communications service." Pet. App. 15a (emphasis in original).

Yet this assumption is inappropriate for determining jurisdiction. As other courts have repeatedly held, "'the key issue[] . . . is the nature of the communications which pass through the facilities, not the physical location of the lines.'" *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978) (citation omitted). There are no limits on a carrier's use of interconnection, unbundled network elements and resale. In any event, there is no record substantiation for the Eighth Circuit's conclusion, and the court should not have acted as a fact-finder on this point. To the contrary, interconnection, network elements, and resale

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104, 115 (D.C. Cir. 1989).

will be used—and in fact are already being used—for both intrastate and interstate telecommunications services.

2. The Eighth Circuit Failed to Recognize the Significant Role Preserved for the States by the 1996 Act

Contrary to the Eighth Circuit's view, the shared federal/state jurisdiction scheme in the 1996 Act preserves a significant and important role for state regulatory commissions. Allowing the FCC to define costing standards for purposes of section 252(d) does not make state commissions into ministerial actors. Rather, it reflects a recognition that rate-setting determinations are complex and highly evidence-dependent. Thus, the Act places these decisions in the purview of state commissions, which have far more experience in ratemaking proceedings than the FCC. In order to make specific rate "determinations," state commissions must sift through a vast amount of cost data in order to ensure that the rates set are cost-based.

There is nothing in the FCC's rules that requires a state commission to attach a pre-ordained number to interconnection rates. Establishing a costing methodology, in this case a forward-looking pricing model, does not dictate specific interconnection, network element or resale prices for state commission adoption. For instance, the FCC's rules allow states to determine cost of capital, depreciation and other factors to "plug into" the forward-looking pricing model, because the financial state of carriers and the costs of providing service will sometimes vary from state to state.

In setting "proxy" rates, of course, the FCC actually prescribed particular rates for unbundled network elements and interconnection to be used as "default" prices if a state commission were unable to undertake the full cost analysis

necessary to determine rates within the prescribed statutory timeframe for arbitrations. *First Report and Order* ¶ 619. In this respect, the FCC overstepped its authority because it actually "established" or "determined" prices by setting actual proxy rates for use in lieu of state-determined rates. This issue is moot, however, because the proxy rates applied only where states could not adopt costing methodologies to set prices within the Act's time constraint on state-supervised interconnection arbitrations. Thus, the FCC's use of proxies is not a ground for affirming the court of appeals.

III. THE COURT OF APPEALS CORRECTLY UPHELD THE FCC'S INTERPRETATION OF THE ACT'S "REBUNDLING" PROVISIONS, BUT ON REHEARING IMPROPERLY STRUCK DOWN THE FCC'S RULE PROHIBITING DISASSEMBLY

A. The Eighth Circuit Correctly Concluded That the FCC's Rebundling Rule Complies with the Plain Meaning of the Act

It is undisputed that section 251 grants the FCC authority to promulgate federal unbundling rules. *See* 47 U.S.C. § 251(d)(1). Rather, the issue raised by incumbent carriers[9] before this Court is whether the FCC's implementation of section 251 contravenes the Act's requirement that incumbent local exchange carriers "shall provide such

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[9] Conditional Cross-Petition of Regional Bell Companies, *Ameritech Corp. v. FCC*, No. 97-1075 (question 1); Conditional Cross-Petition, *GTE v. Midwest, Inc. v. FCC*, No. 97-1087 (question 1); Conditional Cross-Petition of USWest, *US West, Inc. v. FCC*, No. 97-1099 (question 1); Conditional Cross-Petition of the Mid-Sized Local Exchange Carriers, *The Southern New England Telephone Co. v. FCC*, No. 97-1141 (question 1).

unbundled network elements *in a manner that allows* requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The FCC's rule 51.315(b) allows a competing carrier to combine leased network elements to provide a full retail, or "finished," telecommunications service. *First Report and Order* ¶ 356. As the Eighth Circuit concluded, this "rebundling" rule comports with Congress's expressed intent and should be upheld. Pet. App. 54a.

1. The FCC's Rebundling Decisions Must Be Upheld In Light of the Plain Language of Section 251(c)(3)

Where a statute is clear by its language, courts will defer to an administrative agency's implementing interpretation that is consistent with the statute. *Chevron*, 467 U.S. at 842-43. Because section 251(c)(3) expressly contemplates that competing carriers may "combine" unbundled network elements leased from incumbent local carriers in order to "provide . . . telecommunications service," 47 U.S.C. § 251(c)(3), on this point the court of appeals correctly deferred to the FCC. Pet. App. 55a-56a. The agency's interpretation is compelled by the 1996 Act, while the arguments of the Cross Petitioners seek to add language that does not exist in the 1996 Act.

Nothing in the language or structure of the Act precludes the FCC's rule. Cross Petitioners each assert that competing carriers should not be permitted to offer "finished services" through leased unbundled elements without providing any facilities of their own. *See generally* US West Petition at 5-6; Ameritech Petition at 14-22. They argue that section 251(c)(3)'s requirement to provide "nondiscriminatory access to unbundled network elements at any

technically feasible point" is inconsistent with the FCC's rule, reasoning this language would become a "fiction" if no facilities are provided by the competitor. Ameritech Cross-Petition at 18; *accord* US West Petition at 5.

The crucial flaw in this argument is that section 251 merely ensures that the requested access be provided wherever a requesting carrier seeks such access so long as it is "technically feasible." 47 U.S.C. § 251(c)(3). Had Congress intended to limit competitors to unbundled elements only in conjunction with their own facilities, as Cross Petitioners insist, then Congress could, and would, have included such a restriction expressly. Congress did not, and therefore this restriction cannot be read into the text.[10]

Likewise, permitting competitors to provide finished services through combinations of leased network elements in no way obviates the distinctive entry modes established in the Act. *See supra* pp. 4-5. Cross Petitioners contend that the FCC's rule undermines the "incentive" for facilities-based entry. *See* Ameritech petition at 15; US West Petition at 4-5. Yet, despite incumbent carriers' protests, very real and substantial distinctions still exist between the use of network elements to provide telecommunications services and entry through resale, and each mode of entry retains its own advantages and disadvantages. For instance, carriers reselling incumbents' services are left offering only the services that are already provided to local customers. On the other hand, by purchasing unbundled network elements,

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[10] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that when Congress explicitly states its will "that language must ordinarily be regarded as conclusive"); *see also United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

competitors are free to enhance or embellish the service offering, provide different service packages and distinguish their offerings from those of the incumbents to provide customers with a variety of service alternatives. As the Eighth Circuit also found, "unbundled access has several disadvantages that preserve resale as a meaningful alternative." Pet. App. 56a.

Cross Petitioners' reliance on isolated phrases in the legislative history to suggest a congressional "preference" for one form of entry over another similarly fails. *See, e.g.*, Ameritech Cross-Petition at 18-19. First, reliance on legislative history when the statutory language is clear is unnecessary and improper.[11] The statutory language is clear. Second, contrary to the incumbent carrier assertions, neither the Act nor the legislative history exhibits a congressional bias toward facilities-based competition. *See* Ameritech Cross-Petition at 18-19. Rather, Congress created several avenues for entry into the local market. As the Eighth Circuit recognized, it is not correct to presume that "the Act's exclusive goal is facilities-based competition." Pet. App. 59a. Therefore, even if the FCC's rebundling rule would suppress development of facilities-based competition, Cross Petitioners' remedy must come through a congressional amendment, not from this Court.

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[11] *See Blum v. Stenson*, 456 U.S. 886, 896 (1984) ("We look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 63 (1953)(concluding that investigation of legislative history is improper where "the words Congress used . . . are too precise for extended argument").

2. The Cross-Petitioners Inappropriately Ask This Court to Substitute Its Judgment for That of the Expert Agency

The Cross Petitioners' principal argument for prohibiting rebundling has no basis in the statutory language. Cross Petitioners complain that rebundling elements allows competitors to "capture" their most "profitable customers without providing service more efficiently or investing one cent in competitive network facilities." Ameritech Cross-Petition at 15; *see* GTE Cross-Petition at 16. Even if true, this argument should be addressed to Congress, not the Court.

When competitors enter the market through access to network elements, the 1996 Act requires that incumbents charge prices that are "based on cost." 47 U.S.C. § 252(d)(1). Resale services are to be priced at a discount off the incumbent's retail prices that reflects the costs that will be "avoided" by the incumbent carrier. 47 U.S.C. § 252(d)(3). In the competitive market envisioned by Congress, prices for telecommunications services will be driven toward costs. Consequently, as competition develops and prices move toward cost, the retail offerings of incumbents would also move toward cost.[12] Correspondingly, as retail rates decline, wholesale rates for resale of incumbent services would likewise decline toward cost. Clearly, over time with the development of competition, these rates would converge with those paid for use of unbundled network elements. Thus, to the extent a price

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[12] Incumbents contend that movement of prices toward costs in the retail environment would undermine the policy goal of universal service. *E.g.*, Ameritech Petition at 23. However, Congress provided that the FCC address this issue separately in section 254. 47 U.S.C. § 254. Thus, any demonstrable failure of local rates to recover costs would be appropriately recovered through universal service reform.

differential persists between the use of unbundled elements and resale, that differential represents residual monopoly profits that do not reflect the true costs of service or prices that would occur in a competitive local telephone marketplace.

Without any hook to the language of the 1996 Act, the incumbent local carriers are asking this Court to substitute another policy rationale for the will of Congress. *See Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."). The intent of Congress to allow rebundling of unbundled elements is unmistakable; to overturn the FCC's rule would be to allow the judiciary to rewrite section 251 in derogation of Congress's expressed goals.[13]

B. The Eighth Circuit Erred in Overturning on Rehearing the FCC's "Disassembly" Rule 51.315(b)

Section 251 requires that incumbents provide "nondiscriminatory access" to unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide" telecommunications service. 47 U.S.C. § 251(c)(3). In promulgating rule 51.315(b), the FCC concluded that the "nondiscrimination" requirement bars incumbent carriers from pulling apart previously joined network elements for the purpose of imposing anticompetitive costs on new entrants that request access to those elements. *First Report and Order* ¶ 293; 47 C.F.R. §

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[13] *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 626 (1978)("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.").

51.315(b). The agency held that the ability of requesting carriers to "rebundle" elements did not preclude this requirement, since it is one "manner" in which competitors could "combine" elements. On rehearing, however, the Eighth Circuit found that the statutory language precluded the FCC's interpretation and vacated the rule. Pet. App. 52a-53a. This holding is not supported by the language of the Act and must be reversed.

First, as the FCC correctly determined, to permit incumbent carriers to break apart elements that competitors purchase would be discriminatory and anticompetitive, in contravention of the statutory requirement that incumbent local carriers must provide unbundled elements in a *nondiscriminatory manner*. The Eighth Circuit's opinion never addresses this critical statutory requirement. As the FCC found, local carriers do not pull apart network elements to provide them to their own retail operations. *See First Report and Order* ¶ 296. Rather, typically they simply provide service using the existing, combined elements. *Id.* Further, there is no technical reason to disassemble elements that will just be recombined. *Id.* Thus, the FCC's rule 51.315(b) prevents incumbents from imposing the unnecessary cost and delay on their competitors that is not imposed on its own provision of service, and is necessary to meet the statutory requirement of nondiscrimination.

Second, while section 251 clearly grants expansive access to unbundled network elements, 47 U.S.C. § 251(c)(3), the statute does *not* directly address the specific "manner" in which those elements must be provided. When implementing this requirement, as directed by section 251(d), the FCC therefore determined that section 251 requires incumbent local carriers to recombine network elements. That determination must receive deference as a reasonable interpretation of an ambiguous statute, and the

reviewing court is precluded from substituting its own policy goals for those of the FCC. *Chevron*, 467 U.S. at 843-44. The Eighth Circuit violated this well-settled precept of judicial review when it overturned the FCC's recombination rule based on its differing statutory interpretation.

The Eighth Circuit purported to rely on the plain language of section 251, stating that the Act requires competitors, not incumbents, to "combine" elements. *See* Pet. App. 53a. The statutory language does not, however, preclude competitors from "combining" elements *through the incumbent*.[14] Because the FCC's rule did not directly *conflict* with section 251, the Eighth Circuit was bound to uphold it. *Chevron*, 467 U.S. at 843-44.

Moreover, as discussed *supra*, Section II.B, the FCC has generic rulemaking authority under the Communications Act to require carriers to combine network elements, so long as such a requirement is not inconsistent with the statutory language.[15] As discussed above, this language is essential to implement the nondiscrimination requirements of the Act and does not in fact "collapse" the "careful distinctions Congress has drawn" between market entry through unbundled network elements and resale. *See supra*, pp. 4-5.

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[14] The Eighth Circuit's observation that the incumbent carriers do not wish to combine elements is irrelevant to this analysis. Pet. App. 52a-53a. By that reasoning, most of the requirements of the Act, which are aimed at breaking the incumbents' local monopoly, would be overturned. Under settled principles of judicial review, however, the court is precluded from substituting its judgment for that of the expert agency, unless the agency's rules conflict with the statutory language. *Chevron*, 467 U.S. at 842-43. No such conflict exists, and incumbent intransigence does not raise such a conflict.

[15] *See Second Computer Inquiry*, 77 F.C.C.2d 384, 442-444 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982)(establishing unbundling requirements under its general statutory authority).

Thus, the Eighth Circuit erred in vacating the FCC's rule 51.315(b), and must be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed in part as to the FCC's pricing rules and rule 51.315(b), and affirmed in part as to the FCC's "rebundling" rule.

Respectfully submitted,

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